

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GREGORY A. FRANKLIN,  
CDC #E-66269,

Plaintiff,

vs.

L.E. SCRIBNER, et al.,

Defendants.

Civil No. 07-0438 BTM (LSP)

**ORDER:**

**(1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE, GARNISHING \$350 FROM PRISONER'S TRUST ACCOUNT [Doc. No. 2-1];**

**(2) DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT PREJUDICE [Doc. No. 3-1]; AND**

**(3) DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF COMPLAINT**

Plaintiff, Gregory Franklin, a state prisoner currently incarcerated at Calipatria State Prison ("Calipatria") in Calipatria, California, and proceeding pro se, has submitted a civil rights Complaint pursuant to 42 U.S.C. § 1983.<sup>1</sup> Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP")

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<sup>1</sup> The proceedings were assigned to this Court, but all post-service matters have been referred to Magistrate Judge Leo S. Papas by Local Rule 72.3(e), "Assignment of § 1983 Prisoner Civil Cases to United States Magistrate Judges," pursuant to 28 U.S.C. § 636. See *Gomez v. Vernon*, 255 F.3d 1118, 1126 (9th Cir. 2001).

1 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], as well as a Motion for Temporary Restraining  
 2 Order [Doc. No. 3].

3 **I. Motion to Proceed IFP [Doc. No. 2]**

4 All parties instituting any civil action, suit or proceeding in a district court of the United  
 5 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 6 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only  
 7 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
 8 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,  
 9 remain obligated to pay the entire fee in installments, regardless of whether the action is  
 10 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a  
 12 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account  
 13 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
 14 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). From the certified trust account  
 15 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits  
 16 in the account for the past six months, or (b) the average monthly balance in the account for the  
 17 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.  
 18 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must  
 19 collect subsequent payments, assessed at 20% of the preceding month's income, in any month  
 20 in which the prisoner's account exceeds \$10, and forward those payments to the Court until the  
 21 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

22 The Court finds that Plaintiff has submitted an affidavit sufficient to show that he has no  
 23 funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n  
 24 no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or  
 25 criminal judgment for the reason that the prisoner has no assets and no means by which to pay  
 26 the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts  
 27 as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to pay  
 28 . . . due to the lack of funds available to him when payment is ordered."). Therefore, the Court

1     **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing  
 2     fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated  
 3     shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment  
 4     provisions set forth in 28 U.S.C. § 1915(b)(1).

5     **II.     Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

6         Notwithstanding IFP status or the payment of any partial filing fees, the Court must  
 7     subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening  
 8     and order the sua sponte dismissal of any case it finds "frivolous, malicious, failing to state a  
 9     claim upon which relief may be granted, or seeking monetary relief from a defendant immune  
 10    from such relief." 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.  
 11    2001) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); *Lopez v.*  
 12    *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) "not  
 13    only permits but requires" the court to sua sponte dismiss an *in forma pauperis* complaint that  
 14    fails to state a claim).

15         "[W]hen determining whether a complaint states a claim, a court must accept as true all  
 16     allegations of material fact and must construe those facts in the light most favorable to the  
 17     plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194  
 18     (noting that § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure 12(b)(6)");  
 19     *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se's  
 20     pleadings, *see Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988),  
 21     which is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261  
 22     (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the  
 23     court may not "supply essential elements of claims that were not initially pled." *Ivey v. Board*  
 24     *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

25         Here, the Court finds that Plaintiff's retaliation and equal protection claims survive the  
 26     sua sponte screening required by 28 U.S.C. § 1915(e)(2), and that Plaintiff is therefore  
 27     automatically entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27;  
 28     28 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all

1 duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(2) (providing that “service be effected by a United  
 2 States marshal, deputy Untied States marshal, or other officer specially appointed by the court  
 3 ... when the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.”).

4       However, the Court dismisses Plaintiff’s property claims for failing to state a claim upon  
 5 which relief can be granted. In his Complaint, Plaintiff alleges that his due process rights were  
 6 violated when prison officials removed some of his property from his cell.<sup>2</sup> To the extent that  
 7 Plaintiff wishes to bring a claim relating to the negligent or unauthorized deprivation of his  
 8 property, such a claim will not state a federal cause of action under § 1983 if the plaintiff has an  
 9 adequate post-deprivation state remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The  
 10 California Tort Claims Act (“CTCA”) provides an adequate post-deprivation state remedy for  
 11 the random and unauthorized taking of property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th  
 12 Cir. 1994). Thus, Plaintiff has an adequate state post-deprivation remedy and his claims relating  
 13 to the taking of his property are not cognizable in this § 1983 action, and must be dismissed  
 14 pursuant to 28 U.S.C. § 1915(e)(2).

### 15       **III. Plaintiff’s Motion for Temporary Restraining Order (“TRO”) [Doc. No. 3]**

16       Plaintiff also filed a Motion for TRO [Doc. No. 3], along with several exhibits in support  
 17 of his motion for a TRO.

18       The purpose of a temporary restraining order is to preserve the status quo before a  
 19 preliminary injunction hearing may be held; its provisional remedial nature is designed merely  
 20 to prevent irreparable loss of rights prior to judgment. *Sierra On-Line, Inc. v. Phoenix Software,*  
 21 *Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Under Federal Rule of Civil Procedure 65, a  
 22 temporary restraining order may be granted “only if (1) it clearly appears from the specific facts  
 23 shown ... that immediate and irreparable injury, loss, or damage will result to the applicant

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24  
 25       <sup>2</sup> While Plaintiff’s Complaint is not entirely clear, he does appear to allege that his property was  
 26 removed on some occasions in response to administrative grievances he has filed. The Court liberally  
 27 construes these claims as retaliation claims and finds that these factual allegations may state a claim  
 28 upon which § 1983 relief may be granted. However, some of Plaintiff’s claims regarding the removal  
 of his property appear to occur prior to the filing of any administrative grievance. In order to state a  
 retaliation claim, one element Plaintiff must be able to show is he was retaliated against for exercising  
 his constitutional rights. *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam). Thus,  
 the Court dismisses the claims relating to lost property that occurred prior to Plaintiff alleging that he  
 was retaliated against for exercising his constitutional rights during the administrative grievance process.

1 before the adverse party or that party's attorney can be heard in opposition." FED.R.CIV.P.  
 2 65(b). A party seeking a TRO must satisfy the same test required for the issuance of a  
 3 preliminary injunction. *See Bronco Wine Co. v. U.S. Dept. of Treasury*, 997 F. Supp. 1309, 1313  
 4 (E.D. Cal. 1996); *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320,  
 5 1322 (N.D. Cal. 1995).

6 In order to obtain a preliminary injunction the movant must demonstrate "(1) a strong  
 7 likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if  
 8 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)  
 9 advancement of the public interest (in certain cases)." *Beardslee v. Woodford*, 395 F.3d 1064,  
 10 1067 (9th Cir. 2005) (citing *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th  
 11 Cir. 1995)) (internal quotation marks and citation omitted). Alternatively, injunctive relief could  
 12 be granted if the movant "demonstrates 'either a combination of probable success on the merits  
 13 and the possibility of irreparable injury or that serious questions are raised and the balance of  
 14 hardships tips sharply in his favor.'" *Id.* (citation omitted). "These two alternatives represent  
 15 'extremes of a single continuum,' rather than two separate tests." *Clear Channel Outdoor Inc.*  
 16 *v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (citation omitted).

17 A federal district court may issue emergency injunctive relief only if it has personal  
 18 jurisdiction over the parties and subject matter jurisdiction over the lawsuit. *See Murphy Bros.,*  
 19 *Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (noting that one "becomes a party  
 20 officially, and is required to take action in that capacity, only upon service of summons or other  
 21 authority-asserting measure stating the time within which the party served must appear to  
 22 defend."). The court may not attempt to determine the rights of persons not before the court.  
 23 *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 234-35 (1916); *Zepeda v. INS*,  
 24 753 F.2d 719, 727-28 (9th Cir. 1983); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*,  
 25 817 F. Supp. 953, 961 (M.D. Fl. 1993); *Kandlbinder v. Reagan*, 713 F. Supp. 337, 339 (W.D.  
 26 Mo. 1989); *Suster v. Marshall*, 952 F. Supp. 693, 701 (N.D. Ohio 1996); *see also Califano v.*  
 27 *Yamasaki*, 442 U.S. 682, 702 (1979) (injunctive relief must be "narrowly tailored to give only  
 28 the relief to which plaintiffs are entitled"); 18 U.S.C. § 3626(a)(2) ("In any civil action with

1 respect to prison conditions, ... [p]reliminary injunctive relief must be narrowly drawn, extend  
 2 no further than necessary to correct the harm the court finds requires preliminary relief, and be  
 3 the least intrusive means necessary to correct that harm.”).

4       Under Federal Rule of Civil Procedure 65(d), an injunction binds only “the parties to the  
 5 action, their officers, agents, servants, employees, and attorneys, and ... those persons in active  
 6 concert or participation with them who receive actual notice of the order.” The district court  
 7 must, therefore, tailor the injunction to affect only those persons over which it has power. *See*  
 8 *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481 (1978); *see also* 11A Wright &  
 9 Miller, FEDERAL PRACTICE & PROCEDURE, § 2941 (2d ed. 1995). At this time, Plaintiff has not  
 10 effected proper service on any of the named Defendants.

11       Moreover, even if this Court had personal jurisdiction over the Defendants Plaintiff seeks  
 12 to enjoin, he has failed to establish either an imminent irreparable injury, or the likelihood of  
 13 success on the merits. *See Beardslee*, 395 F.3d at 1067. First, while Plaintiff claims to have  
 14 suffered injuries as a result of actions taken by prison officials in 2005, the threat of injury  
 15 required to justify extraordinary injunctive relief must be imminent and not merely speculative.  
 16 *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674-75 (9th Cir. 1988). In addition,  
 17 where a temporary restraining order is sought against actions by a governmental actor or agency  
 18 which has allegedly violated the law in the *past*, as is the case here, Plaintiff must establish that  
 19 the threat of future or repeated injury is both “real and immediate,” not just “conjectural” or  
 20 “hypothetical.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). This he has not done.

21       Thus, for all these reasons, the Court must **DENY** without prejudice Plaintiff’s Motion  
 22 for Temporary Restraining Order [Doc. No. 3] pursuant to FED.R.CIV.P. 65(b). However, the  
 23 Court will permit Plaintiff to file a Motion for Preliminary Injunction once all named Defendants  
 24 have been served with the Complaint and appeared in this action.

25 **IV. Conclusion and Order**

26       Good cause appearing, **IT IS HEREBY ORDERED** that:

27       1. Plaintiff’s Motion for TRO [Doc. No. 3] is **DENIED** without prejudice;

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1       2. Plaintiff's non-retaliatory property claims are **DISMISSED** without prejudice for  
2 failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2);

3       3. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]  
4 is **GRANTED**.

5       **IT IS FURTHER ORDERED** that:

6       4. The Clerk shall issue the summons, provide Plaintiff with a certified copy of both  
7 this Order and his Complaint, and forward them to Plaintiff along with a blank U.S. Marshal  
8 Form 285 for each Defendant named in his Complaint. Plaintiff shall complete the Form 285s  
9 and forward them to the United States Marshal. The U.S. Marshal shall then serve a copy of the  
10 Complaint and summons upon Defendants as directed by Plaintiff on each U.S. Marshal Form  
11 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);  
12 FED.R.Civ.P. 4(c)(2).

13       5. Defendants are thereafter **ORDERED** to reply to the Complaint within the time  
14 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C.  
15 § 1997e(g)(2) (while Defendants may occasionally be permitted to "waive the right to reply to  
16 any action brought by a prisoner confined in any jail, prison, or other correctional facility under  
17 section 1983," once the Court has conducted its *sua sponte* screening pursuant to 28 U.S.C.  
18 § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face  
19 on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits,"  
20 Defendants are required to respond).

21       6. Plaintiff shall serve upon Defendants or, if appearance has been entered by  
22 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
23 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
24 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
25 of any document was served on Defendants, or counsel for Defendants, and the date of service.

26       Any paper received by the Court which has not been filed with the Clerk or which fails  
27 to include a Certificate of Service will be disregarded.

28

1       7. If Plaintiff wishes to amend his Complaint to correct any deficiencies in pleading  
2 identified by the Court in this Order, he may file a First Amended Complaint thirty (30) days  
3 after Defendants have appeared in this action.

## **IT IS SO ORDERED.**

DATED: May 21, 2007

Benny Ted Mackintosh

Hon. Barry Ted Moskowitz  
United States District Judge